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Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

JOHN W. HARRIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below.

There was no opinion in the United States District Court for the District of Massachusetts.

The opinion of the Court of Appeals for the First Circuit, entered on October 28, 1966, is not yet officially reported, but is annexed hereto as Appendix A.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on October 28, 1966 (Appendix B). The

jurisdiction of the Court is invoked under 28 U.S. Code, § 1254, and Rule 22 (2) of the Supreme Court of the United States.

Statutes Involved.

TITLE 26, UNITED STATES CODE, SECTION 7214 (a) (4).

"Any officer or employee of the United States acting in connection with any revenue law of the United States—

. . . . . .

"(4) who conspires or colludes with any other person to defraud the United States; . . .

. . . . . .

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution."

TITLE 18, UNITED STATES CODE, SECTION 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

TITLE 18, UNITED STATES CODE, SECTION 201 (c) (1) (2).

"(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

"(1) being influenced in his performance of any official act; or

"(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States;

. . . . . .

"Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States."

Questions Presented.

1. Whether petitioner had a right of discovery and inspection of all wire and tape recordings made by the government prior to actual trial.

2. Whether the electronic eavesdropping, in the circumstances of this case, is a violation of the Fourth and Fifth Amendments to the Constitution of the United States.

3. Whether the statements and comments of the petitioner made after he became a prime suspect were ad-

missible, he not having been warned of his right to counsel, and he not having been warned of his right to remain silent, and he not having been warned that anything he might say might be used against him.

4. Where two co-defendants are exposed to maximum imprisonment of thirty-five years on an indictment containing two counts of conspiracy and two substantive counts of bribery; and where one of these co-defendants pleads guilty and is sentenced to imprisonment of eighteen months on such indictment and where the other defendant after trial is found not guilty of the substantive counts and guilty of the conspiracy counts with its imprisonment exposure of five years; whether in these circumstances of disparity in sentences the petitioner was thus denied his rights under the Eighth Amendment to the Constitution and punished for the exercise of his rights under the Sixth Amendment.

Statement of the Case.

Petitioner, John W. Harris of Norwood, Massachusetts, an employee of the Internal Revenue Service for fourteen years (R. 653), worked during 1964 and 1965 in the Collection Division as a Revenue Officer assigned to Group 3 in the Boston Collection Area (R. 24-25). Lawrence H. Chandler, an employee of the Internal Revenue Service for twenty-two years, was the immediate Group Supervisor of Harris (R. 658) during 1964 and 1965.

Humphrey Sullivan, an Internal Revenue Service officer, explained the functions and responsibilities of Harris and Chandler and the meaning of Form 53 (R. 117-200, 216-231). He pointed out that—

> A Revenue Officer is responsible for collecting delinquent accounts and for determining whether or not the taxpayer is delinquent in any other areas.

> A Group Supervisor is responsible to look over delinquent accounts to see whether or not proper action is taken and to make sure the Revenue Officer is performing all his required functions (R. 121).

He further revealed that—

> If a Revenue Officer believes after an investigation that a taxpayer is insolvent and the tax is uncollectible, he then should prepare a Form 53 "Revenue Officer's Report of Uncollectible Taxes" (R. 122). The Form 53 must be submitted to the Group Supervisor for his signature of approval (R. 125). Then it goes to an independent Revenue Officer in a different branch (Returns and Receipts) for his review (R. 126).

Both Harris and Chandler were indicted on four counts. Briefly stated, they were charged with (*a*) bribery (18 U.S.C. § 201 (c) (2)); (*b*) defrauding the government (26 U.S.C. § 7214 (a) (4)); and (*c*) conspiracy to commit both (*a*) and (*b*) (R. 7-11). Both parties pleaded not guilty on January 25, 1965 (R. 1), and trial commenced on January 4, 1966 (R. 4). On January 12, 1966, Chandler retracted his plea of not guilty and pleaded guilty on all counts and later testified as a rebuttal witness against Harris (R. 4, 428-429, 814-830). On January 20, 1966, Harris was found by the jury to be not guilty on the two substantive counts but guilty on the two conspiracy counts (R. 5). Harris was sentenced to be imprisoned on count I for three years and on count II for three years, to run concurrently with the sentence imposed on count I. Chandler, who was guilty on all four counts, was sentenced to be imprisoned for eighteen months on each count, each count to run concurrently (R. 6). Harris's and Chandler's motions for discovery and dismissal of the indictments were all denied

(R. 12-15). In addition, all motions for judgment of acquittal and a new trial were denied (R. 4-7).

In October of 1964, Harris was assigned to attempt to collect the unpaid employee withholding taxes of the Anita Chue Restaurant (R. 660). In early December, Harris learned that the forementioned restaurant was sold, and consequently, on December 4, 1964, he filed a request for quick assessment, which was approved by Chandler (Ex. D) (R. 676). Attorney Benjamin A. Dwork was the attorney for Anita Chue in her problems with the Internal Revenue Service. Harris and Dwork first met face to face on December 11, 1964, at the Internal Revenue Office, when Harris pointed out that the liability of the restaurant, plus penalties, amounted to $17,000 or $18,000 (R. 34-35). Attorney Dwork pointed out to Harris that the restaurant had recently been sold and that approximately $8,000 was held in an escrow account for purposes of paying off outstanding debts incurred by the Anita Chue Restaurant (R. 36). No hint or mention of a bribe occurred at this meeting. As a result of the meeting, Attorney Dwork sent to the Internal Revenue Service a check dated December 17, 1964, for $4,000, drawn on the escrow account, payable to the District Director of the Internal Revenue (Ex. 1) (R. 37-39). No accompanying letter was sent with the check, but the envelope was addressed to Harris's attention (R. 682). It turned out that, rather than $8,000, only $5,860.75 was held in the escrow account, and thus the remaining $1,860.75 was kept as a legal fee (R. 37).

On December 29, 1964, Harris and Dwork met at Dwork's private law office, 20 Pemberton Square, Boston, for approximately one hour, between 1 and 2 p.m. According to Dwork's testimony, Harris at this time suggested that "he could . . . be able to recommend that it [Anita Chue's liability] be written off as uncollectible if the financial

statement which he had given to me [Dwork] was in line with the resume that he had shown me . . .'' (R. 41). Harris further stated that Dwork ''should take a thousand-dollar fee and I should take it in cash, and that I should offer $3,000 as a compromise settlement on Mrs. Chue's and on the corporation's tax liabilities . . .'' (R. 41-42).

After the aforementioned meeting, Dwork went immediately to the United States Attorney's office and reported the details of the conference (R. 44). As a result of that meeting, three Internal Revenue Service inspectors, O'Brien, Callahan and Ward, were assigned to the case (R. 44-45). These inspectors immediately commenced to wire Dwork's office, telephone and automobile with highly sophisticated electronic devices for purposes of eavesdropping and recording all conversations between Harris and Dwork and possibly anyone else who happened to call or visit Dwork (R. 45, 52, 56, 57, 235-245, 330). And, in fact, Chandler's private office cubicle in the Internal Revenue Service at 174 Ipswich Street was also electronically wired. From October, 1964, through January, 1965, a concealed mike was placed in a steel support post to Chandler's office (R. 261) and listening devices and a recorder were installed in a room across town at 136 Federal Street, Boston (R. 242-245, 250, 271-275, 292-295, 483-488). For a period of at least four months it is fair to say that everyone who entered that office and conversed with Chandler was the victim of electronic eavesdropping (R. 293, 483-488). Needless to say, no permission was given to the inspectors by Chandler to wire his office.

The next communication between Dwork and Harris was over the telephone at approximately 6 p.m. on December 31, 1964. Dwork called from his office to Harris's home, and the entire conversation was listened to by the inspectors and recorded (Ex. 16) (R. 46, 235-240, 330-337, 432-441).

According to Dwork's testimony, Harris alluded to some write-off form (Form 53) he was preparing and compared the information on his form with the information that Dwork was entering on a Form #433-AB (R. 48). Harris also asked Dwork if he could get the checks from Aborn (co-escrow agent on Anita Chue's escrow account), and further remarked that "the fellow he spoke to at the office was concerned also" (R. 49) and that, "if he talks to someone, he can pave the way for clearing this up" (R. 49-50). Harris also remarked that "he would arrange to get it [the $4,000 check] for me" (R. 50-51).

On Monday, January 4, 1965, Harris visited Dwork at his office. Of course, all three inspectors were in another room, eavesdropping and recording the entire conversation (Ex. 18) (R. 53-54, 237-240, 337-344, 442-449). Harris handed over the $4,000 check (Ex. 1) to him and said "there was no record of it anywhere" (R. 54). Harris also said that "The thousand dollars is yours, but the $3,000 has to be in cash" (R. 54). Later, Harris remarked that the fellow at the office was concerned about Dwork's partner and that "the fellow at the office was also apprehensive or squeamish about it" (R. 55).

The next meeting, which was pre-arranged by both parties, took place on January 6, 1965, in a parking lot to Howard Johnson's Restaurant, Chestnut Hill, Massachusetts. Harris parked his car and got into Dwork's car, which, of course, was bugged with a transmitting device behind the dashboard (R. 57, 240-243). Listening devices and recording machines were placed in a second-floor apartment at 11 Tully Street, Chestnut Hill, with the permission of the resident (Ex. 21) (R. 354-357). The three inspectors huddled in this apartment with their gear for purposes of eavesdropping and recording the meeting between Harris and Dwork (R. 57). According to Dwork's testimony, after en-

tering the car Harris read a typewritten form to him which discussed Anita Chue's financial condition, and then Dwork handed Harris an envelope containing $3,000 in cash in denominations of twenty $100 bills and twenty $50 bills (R. 59). Each and every bill contained in the envelope was marked by the inspectors with indelible fluorescent pencil. In addition, the serial numbers to the bills were recorded (R. 345-346). Harris took the envelope but did not look inside it. He then mentioned that the fellow at the office was concerned (R. 60). This meeting in the parking lot was the last one between Dwork and Harris.

On January 7, 1965, Inspector Joseph N. Gately, among others, was assigned to conduct a surveillance in the vicinity of Harris's home in Norwood, and, according to his testimony, at 10:10 a.m. he observed Harris and Chandler, neither of whom he ever saw before, come out of the Fenway Motor Hotel together, get into Harris's red Mustang, and drive over to the side entrance of the Internal Revenue Building at 174 Ipswich Street, into which they entered together (R. 557-559).

Gately also testified that he and a Gordon Kinney followed Chandler by car and on foot at approximately 1 p.m., on January 7, 1965, and found that Chandler had visited Tweed's haberdashery store at 445 Brookline Avenue (R. 515-579, 594). After Chandler left the store, Gately entered and found that Inspector Powers was already in the store, and, upon inquiry, discovered that Chandler had made some purchases. Inspector Powers obtained a $100 bill (Ex. 27) from the proprietor of Tweed's store, which Chandler left under the fictitious name of Lawrence Shea (R. 580-581, 584, 594-598). The serial number on this bill matched a number earlier recorded by the inspectors.

At 4:50 p.m. on January 7, 1965, four inspectors, including Gately, converged on Chandler at his cubicle on Ipswich

Street and arrested him, whereupon he was searched without a warrant and $1,400 of marked money was found on his person (Ex. 30) (R. 588, 610-614).

At 7 p.m. on January 7th, Harris was arrested in front of his Norwood home (R. 708). No marked money was found on Harris at the arrest or at any other time. He stated that he handed over the entire $3,000 to Chandler (R. 799).

It is important to note that, despite a thorough investigation, the Inspectors were unable to find in the entire file of the Internal Revenue Service a Form 53 filled out by John Harris and signed by him that Anita Chue's taxes were uncollectible (R. 159-160).

Harris took the stand in his own defense and specifically denied each count in the indictment (R. 689-692). He stated, in substance, that Chandler, in assigning the Anita Chue case to him, pointed out that it "looked like a fraud situation" (R. 666) and to "play along with Mr. Dwork and see where it's going" (R. 670, 680). He said that he received the $4,000 check (Ex. 1) in the mail and immediately brought it to Chandler, who in turn instructed him to return the check to Dwork because Chandler believed Dwork was trying to "pull a subterfuge" on the Internal Revenue Service. "We didn't know what the check represented" and "we believed there was more money in escrow" (R. 682-684). On December 29th, pursuant to Chandler's instructions, Harris discussed the $4,000 check with Dwork at his private office and was asked by Dwork to return the check, and the government would get cash from the escrow account (R. 685-698). Harris admitted talking with Dwork over the phone on December 31, 1964, discussing Form 53 and mentioning facts that were not exactly accurate in order to see what Dwork's reaction would be (R. 698). Harris testified that he met with Dwork

on January 4, 1965, and returned the $4,000 check pursuant to Chandler's instructions (R. 699-702). Chandler also instructed him to take any cash offered by Dwork in order to catch him making a bribe (R. 699, 703, 704), which he did do on January 6, in Dwork's car at the Howard Johnson parking lot (R. 705-706), when he received a white envelope with $3,000 in cash from Dwork. On January 7, 1965, Harris testified that he met Chandler and handed the white envelope intact with some papers over to Chandler at his cubicle, and Chandler said he would take them upstairs (R. 707-708).

Chandler took the stand as a rebuttal witness for the government and denied instructing Harris to play along with Dwork and to return the $4,000 check, although he admitted being aware that the check was sent to the Internal Revenue Service (R. 819-820). He also testified that he met with Harris on January 7, 1965, and was given $1,500 by Harris and was told that he would be given the additional $1,500, together with a report, in a few days hence (R. 821).

Reasons for Granting the Writ.

Prior to the trial, petitioner moved the Court for an order requiring the United States Attorney to produce and permit the petitioner to inspect, copy, reproduce and listen to tape recordings made by the government relative to this case. In addition, petitioner requested to inspect the various mechanical devices used by the government (R. 12-14). These motions for discovery and inspection were denied by the trial Court (R. 3, 14).

The petitioner's preparation of his defense was seriously jeopardized by the Court's negative action. Without being able to listen to the tapes before trial, or at least before

Dwork took the stand, the petitioner was unable to have the opportunity to—

a. Thoroughly check the tapes together with an expert to see if any erasures, editing or additions had been made to the tapes, and what, if any, statements, were taped out of context;

b. Fully advise his attorney as to what had transpired so that his attorney could properly advise him with respect to his plea and his defense;

c. Impeach Dwork's and Callahan's testimony on the witness-stand with prior inconsistent statements;

d. Learn what kind of equipment was used, so that he could hire an expert, as the government did, to check the accuracy and authenticity of the tapes.

The evidence shows that Chandler's cubicle was "bugged" for nearly four months. Obviously, many of petitioner's conversations were recorded over that duration. There is no way known to the bar at this date as to how to cross-examine tapes, and thus the petitioner was unfairly prejudiced in a very real sense to be denied the right to inspect the tapes.

> "We think the better view is that counsel for a defendant should be accorded, as of right, an opportunity to interview prospective witnesses held in the custody of the Commonwealth. Witnesses belong neither to the Commonwealth nor to the defence." *Commonwealth* v. *Balliro,* 349 Mass. 505, 516 (1965).
>
> "It is too plain to be labored that the interviewing of prospective witnesses is an essential part of the preparation of a case or trial." *Id.* at 517-518.
>
> "To say that a defendant has a right to present his defence and then to deprive him of the means of

effectively exercising that right would reduce the guaranty to an idle gesture." *Id.* at 517.

A tape recording has been considered a third-party witness, and thus the defendant should have a right to examine it prior to trial. *Monroe* v. *United States,* 234 F. 2d 49, 54-55 (D.C. Cir. 1956). *Lopez* v. *United States,* 373 U.S. 427, 448 (1963). The government saw fit to employ an expert to verify the authenticity and accuracy of the tapes, the machines and equipment used (R. 295-302). The petitioner was denied the right to combat such expert testimony with his own expert, and thus was prejudiced thereunder.

For an attorney to properly advise a criminal defendant on how to plead and how to defend a case, he must have at least some knowledge of the evidence the government has against his client, and especially he should know what incriminating statements his client has made to the government. No criminal lawyer worth his salt would allow a client to proceed to trial if he knew the evidence against his client was strong without first advising him as to the alternative pleas and their consequences and of the expense of a long trial, and the risk of a longer sentence. In a conspiracy case, especially, where the case rises and falls on what was said, a defense counsel should have the opportunity to examine the tapes. Moreover, the clandestine manner in which these tapes were taken makes it unfair for the defendant to be denied access to the tapes of his own statements prior to trial.

In a similar case, *United States* v. *Nolte,* 39 F.R.D. 359, 362-363 (N.D. Cal. 1965), the trial judge, in ruling that fundamental fairness required pretrial production of tapes secretly taken from the defendant, stated:

"The first proceeds from the nature of the government's conduct in this case. The government, un-

known to defendant and without his consent, intercepted messages which he thought he was transmitting in privacy. The messages were recorded and subsequently played back to defendant in an attempt to induce him to cooperate with the government. Then, when defendant had been indicted and was preparing to defend himself at trial, the government refused him further access to the tapes. It would manifestly be unfair, under these circumstances, to deny defendant access to the tape recordings prior to the commencement of his trial.

"The second source of unfairness arises from defendant's need to prepare his defense to the particular charges brought against him. Counsel for defendant asserts that he cannot safely go to trial without first having had an opportunity to listen to and analyze the tape recordings. This contention would seem to be borne out by the record, particularly in view of the allegations of conspiracy made in the indictment. In a case such as this, tape recordings of telephone conversations, purportedly made in furtherance of an unlawful plan, are likely to be central to the government's case against defendant. Pretrial inspection of the recordings may therefore be essential if counsel is to intelligently represent and properly advise the defendant."

Not having access to the tapes before Dwork and the inspectors testified hindered petitioner's ability to impeach their credibility on the witness-stand. "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jencks* v. *United States,* 353 U.S. 657, 667 (1957). It cannot be

said by a Court that there was no error in denying discovery because "no inconsistencies would have come to light if the tape recordings had been examined." "The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis* v. *United States,* 384 U.S. 855, 875 (1966).

A tremendous breakthrough in the field of criminal discovery was announced in the *Dennis* case, *supra,* when this Court held it was reversible error for the lower Court to deny defendant the right to examine the Grand Jury minutes of four government witnesses while the witnesses were available for cross-examination. Evidently the "particularized need" test has been buried. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400 (1959). The Court stated (384 U.S. at 870, 873-874):

> "[There is a] growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.
>
> . . . . . .
>
> "A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. See, *e. g., United States* v. *Bufalino,* 285 F. 2d 408, 417-418 (C. A. 2d Cir. 1960). Under these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. *In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations. For this reason, we cannot accept*

the view of the Court of Appeals that it is 'safe to assume' no inconsistencies would have come to light if the grand jury testimony had been examined. There is no justification for relying upon 'assumption.'" (Emphasis supplied.)

The *Dennis* case is similar to the one at bar inasmuch as Dwork was a key witness and "The charge[s] could not be proved on the basis of evidence exclusive of that here involved." 384 U.S. at 872. "Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements." 384 U.S. at 872-873. See also, *United States* v. *Coplon,* 185 F. 2d 629, 637-639 (2d Cir. 1950); cert. den. 342 U.S. 920 (L. Hand, J.), where the Court held (384 U.S. at 873 n.) that the "defendants were themselves entitled to examine unlawfully taken tape-recordings of telephone conversations although the trial judge had determined that these recordings had not led the Government to evidence introduced at trial."

The government has not given any clear and compelling reasons why the discovery motion was properly denied. Certainly the national security was not involved here, and no expectations of threats or harm to potential witnesses were present. A criminal trial, although adversary, is not a sporting event between sides, and thus full and frank pretrial disclosure of the government's evidence should have been given to the appellant. See, *e.g.,* Brennan, "The Criminal Prosecution: Sporting Event or Quest for Truth?" 1963 Wash. U. L.Q. 279; Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L.J. 1149 (1960).

Another important reason for having the right of discovery is to discover any favorable evidence for the defendant that the government may possess. In this case we only know of the tape recordings that the government decided to use. There may be many more reels of tape hidden in their files which are favorable concerning petitioner. Without the power of discovery, petitioner has no effective means of checking whether or not the government has fulfilled its constitutional duty of turning over favorable evidence. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

Inspector Callahan's testimony as to what he "overheard" between Dwork and Harris through electronic and mechanical means and the tape recordings (Exs. 16, 17, 18, 21) should have been excluded from evidence upon defense attorney's objection (R. 431-432, 443, 449, 453).

To allow these tapes and testimony into evidence is to literally topple the right of privacy from its underpinnings and to give new life to the craft of electronic snoopery.

> "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others . . . *and* even if he has chosen to give them expression, he *generally* retains the power to fix *the limits of the publicity which shall be given them.*" Warren and Brandeis, "The Right to Privacy," 4 Harv. L.R. 193, 198 (1890). (Emphasis supplied.)

In this case we have a most aggravated situation. We have a microphone hidden in one of the stantions of Chandler's private office cubicle on Ipswich Street for approximately four months (R. 472-488). No warrant was issued and no permission was granted by Chandler, and thus the government's conduct was in deliberate violation

of the Massachusetts "eavesdropping" law. Mass. G.L. c. 272, §§ 99-102. A listening device hooked to a tape recorder was set up clear across town in a room at 136 Federal Street, Boston (R. 242-245, 483-488). Telephone trunk lines were leased in order to transmit the sounds (R. 247). For at least four months the private conversations of untold numbers of innocent people who happened to speak in that cubicle were secretly monitored, evaluated and recorded. As was said in *People* v. *Berger*, 239 F. Supp. 219, 225 (S.D. N.Y. 1965):

> "We in the Court see only the 'successful' eavesdroppings, those in which the police succeed in obtaining evidence of guilt. We do not know nor can we estimate how many 'unsuccessful' invasions of the privacy of innocent persons occur each day."

Much of the critical evidence against Harris was gained through hidden electronic devices on Dwork's phones, in his office and in his car. The "imperative" of judicial integrity requires the exclusion of all eavesdropping evidence. People v. Dinan, 11 N.Y. 2d 350, 183 N.E. 2d 689. Cf. Estes v. Texas, 381 U.S. 532, 584, 585 (1965).

> "A mechanical recording is not evidence that is merely repetitive or corroborative of human testimony. . . . [I]ts credibility does not depend upon the credibility of the human witness. . . . [The] recordings are independent thirty-party evidence." Brennan, J., dissenting in *Lopez* v. *United States*, 373 U.S. 427, 448 (1963).

It is within the Court's province to make law for purposes of deterring future unconstitutional methods practiced by the police even though the reliability and relevancy of the evidence to be stricken is not questioned. *Mapp* v.

Ohio, 367 U.S. 643. *Linkletter* v. *Walker*, 381 U.S. 618 (1965). Rule 26, Federal Rules of Criminal Procedure.

> "Until the Court holds inadmissible the fruits of an electronic search made, as in the instant case, with no attempt whatever to comply with the requirements of the Fourth Amendment, there will be no incentive to seek an imaginative solution whereby the rights of individual liberty and the needs of law enforcement are fairly accommodated." *Lopez* v. *United States*, 373 U.S. 427, 465 (1963).

In *Lopez* v. *United States*, 373 U.S. 427, 446 (1963), the minority of the Court (Justices Brennan, Douglas and Goldberg dissented—the Chief Justice concurred) believed that all electronic wire tapping is condemned by the Privacy Clause of the Fourth Amendment. In order to advance this argument, the entire dissent of Justice Brennan's is not quoted, but some of the pertinent quotations are as follows:

> "But there is a right of liberty of communications as of possessions, and the right can only be secure if its limitations are defined within a framework of principle. The Fourth Amendment does not forbid all searches, but it defines the limits and conditions of permissible searches; the compelled disclosure of private communications by electronic means ought equally to be subject to legal regulation." (P. 450.)

> "I believe that there is a grave danger of chilling all private, free, and unconstrained communication if secret recordings, turned over to law enforcement officers by one party to a conversation, are competent evidence of any self-incriminating statements the speaker may have made. *In a free society, people*

ought not to have to watch their every word so carefully." (P. 452.) (Emphasis supplied.)

"". . . while it is a very serious inconvenience to be inhibited from freely speaking over the telephone, it perhaps is a far graver danger to a free society if a person is inhibited from speaking out in his home or office." (P. 453.)

"It is anomalous that the federal courts, while enforcing the right to privacy with respect to telephone communications, recognize no such right with respect to communications wholly within the sanctuaries of home and office." (P. 463.)

"Electronic surveillance . . . makes the police omniscient; and police omniscience is one of the most effective tools of tyranny." (P. 466.)

"The passive and the quiet, equally with the active and the aggressive, are entitled to protection when engaged in the precious activity of expressing ideas or beliefs. Electronic surveillance destroys all anonymity and all privacy; it makes government privy to everything that goes on." (Pp. 470-471.)

There are many technical reasons under the Fourth and Fifth Amendments why the evidence in the instant case obtained through eavesdropping should be excluded. First, it is "mere evidence." *United States* v. *Lefkowitz*, 285 U.S. 452, 464-466 (1932). Secondly, it is evidence gained through blanket, indefinite, exploratory and sweeping invasions of not only the suspect's privacy, but of every other innocent person who is accidentally in the way of the electronic beam. Unlike search warrants, no specificity of time, place or person need be alleged for permission to electronically bug someone's home or car. And, in fact, permission is not even needed. *Marcus* v. *Search Warrant*

of Property, 367 U.S. 717 (1961). *Commonwealth* v. *Jacobs*, 346 Mass. 300 (1963). *United States* v. *Hinton*, 219 F. 2d 324 (7th Cir. 1955). Mass. G.L. c. 276, §§ 1, 2. This permissiveness "revives the evils of the general warrant so bitterly opposed by the American Revolutionaries." *Lopez*, *supra*, at 464. Thirdly, the Fourth Amendment is violated when the search or seizure is accomplished by force or by subterfuge. *Gouled* v. *United States*, 255 U.S. 298, 306 (1921).

After the meeting of December 29, 1964, between Attorney Dwork and Harris, Dwork immediately reported a solicitation of a bribe to the United States Attorney (R. 44). The government, apparently, strongly suspected that criminal activity was being committed by Harris, since it immediately assigned a number of inspectors on the case to follow, tape, eavesdrop and tempt Harris. Certainly, the "accusatory" phase of the case had taken place immediately after Attorney Dwork's complaint. Harris was clearly a prime suspect. The investigation was not a general inquiry, but had "begun to focus on a particular suspect." *Escobedo* v. *Illinois*, 378 U.S. 478, 490-491 (1964). The adversary system began to take place.

Moreover, it is important to note that an alleged crime had already taken place when the United States Attorney received Dwork's report. Solicitation of a bribe, alone, is a crime. 18 U.S.C. § 201 (c). *Woelfel* v. *United States*, 237 F. 2d 484 (1956). Harris could have been indicted immediately on Dwork's testimony without more. By further developing the case, the government and Dwork actually participated in a joint venture of encouraging more crimes to be committed.

To say that the accusatory stage had not taken place at that time would be tantamount to saying that Harris did not become a prime suspect until after he had been induced and entrapped into committing further crimes.

The *Escobedo* decision applies to those cases in which the trial began after June 22, 1964. *Johnson* v. *New Jersey*, 384 U.S. 719, 734 (1966). In the case at bar the trial began after June 22, 1964, but before the *Miranda* decision (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)). Thus the principles of *Escobedo* apply. And as Chief Justice Aldrich pointed out in *Fagundes* v. *United States*, 340 F. 2d 673, 677 (1st Cir. 1965), a defendant's constitutional rights arise "perhaps even at an earlier stage [than arrest] when police attention begins to 'focus' on the accused." A suspect is entitled to counsel "once the adversary system begins to take place."

The statements and conduct of Harris which were overheard and recorded after December 29, 1964, were, of course, incriminatory. It is fair to say that these self-incriminating acts and declarations were given without any warning of his right to counsel, his right against self-incrimination and his absolute right to silence. *Escobedo* v. *Illinois, supra.*

If the Fifth and Sixth Amendments mean anything ("No person . . . shall be compelled in any criminal case to be a witness against himself"; "the accused shall . . . have the effective assistance of counsel"), they should apply here, where petitioner was tricked into being a witness against himself after the government already had sufficient evidence to indict him for the crime of solicitation. In effect, the government, by further developing the case, forced Harris into committing and confessing to more distinct crimes, such as accepting a bribe, returning a government check, colluding with another and preparing a false report. If the *Escobedo* decision does not apply here, then the Court has provided a tremendous loophole for the police to utilize in order to avoid the *Escobedo* and *Miranda* requirements. Instead of arresting someone when there is reasonable ground to believe he has committed a crime,

the police could set up an electronic dragnet by placing secret microphones on persons and places that the suspect frequents and just wait until they have accumulated on tapes enough incriminatory statements. Untold thousands of innocent people would have their privacy invaded by this method as compared to the far lesser number of people (interrogated suspects) whose rights are protected by the *Miranda* decision. It would seem that the government has a moral duty to society to prevent the further commission of crimes and a duty to the defendant, his family and innocent persons to refrain from corralling them into the inescapable arena of the electronic beam.

Therefore all of the tapes (Exs. 16, 17, 18, 21) to which objection was made (R. 431, 432, 443, 449, 453) should have been excluded from evidence, and all of Dwork's and Callahan's testimony concerning Harris's statements after December 29, 1964, should have been suppressed, and thus the petitioner was prejudiced thereby.

The fact that no objection to the testimony given by Dwork and Callahan was made on the forementioned grounds should not preclude review by this Court, inasmuch as substantial rights are involved. Rule 52 (b) of the Federal Rules of Criminal Procedure states that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." *Lash* v. *United States,* 221 F. 2d 237 (1st Cir. 1955); cert. den. 350 U.S. 826.

Disparity and inequality of sentences cannot but have an unwholesome legal effect on potential defendants; on the one hand they give to one defendant an opportunity to shift criminal responsibility to a co-defendant, and on the other hand they tend to penalize a co-defendant who relies upon his right to a trial by jury and his right to demand that the government prove him guilty beyond a reasonable doubt before a jury of his peers.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

OPINION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

October 28, 1966.

McENTEE, *Circuit Judge.* This is an appeal by the defendant Harris from a judgment of conviction entered on a jury verdict finding him guilty of conspiring to defraud the United States in violation of 26 U.S.C. § 7214(a)(4)[1] and of conspiring to demand and receive a bribe in violation of 18 U.S.C. § 371.[2]

Harris was a revenue officer in the Collection Division of the Boston Office of the Internal Revenue Service. Co-defendant Chandler[3] was his immediate supervisor. In the course of his employment Harris was assigned to collect delinquent taxes from a corporation known as Anita Chue,

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[1] § 7214. *Offenses by officers and employees of the United States*

"(a) *Unlawful acts of revenue officers or agents.*—Any officer or employee of the United States acting in connection with any revenue law of the United States—

. . . . . .

(4) who conspires or colludes with any other person to defraud the United States; or

. . . . . .

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. . . ."

[2] § 371. *Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[3] Chandler, who was brought to trial with Harris, changed his plea to guilty during the trial.

Inc. and also from Mrs. Anita Chue individually. Both taxpayers were represented by a Boston attorney named Dwork.

Following a conference with Harris in early December 1964, Dwork sent a check to Internal Revenue for $4,000 in settlement of his clients' tax liabilities.[4] Some two weeks later (December 29) Harris visited Dwork at his law office and told him he could recommend that his clients' tax liabilities be written off as uncollectible if the information to be submitted by Dwork was in line with a resume Harris showed him.[5] Harris then suggested that he would return the $4,000 check, that Dwork take $1,000 in cash as a fee and submit the balance of $3,000 as an offer in compromise. Dwork immediately reported this unusual conversation to the United States Attorney's office in Boston.

In the investigation that followed Dwork allowed Internal Revenue to install electronic equipment in his office and in his automobile for the purpose of listening to and recording his conversations with Harris.[6]

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[4] At that time the Anita Chue Corporation owed the government some $17,000 or $18,000 in taxes for which Mrs. Chue could also be held responsible. The corporation had been recently sold and an escrow account set up in connection with the sale. Harris suggested to Dwork that he take his fee out of this account and submit the balance as an offer in compromise. The $4,000 check represented the balance in the escrow account.

[5] If a revenue officer arrives at the conclusion that the account is uncollectible, he prepares a revenue officer's report of uncollectible taxes. This form contains financial and personal information about the taxpayer and must be submitted for approval to his group supervisor. Before submission the usual procedure is to consult with his group supervisor to see if he agrees that this is an uncollectible tax case.

[6] All conversations between Dwork and Harris which took place after December 29, 1964, were recorded and the audible ones were offered in evidence at the trial. Telephone conversations between them were also listened to and recorded through the use of electronic devices.

On December 31 Dwork called Harris at home at the latter's request and some of the matters connected with Harris' proposal were discussed. A meeting was held at Dwork's office on January 4, 1965.[7] Two days later Dwork met Harris in a parking lot in the Boston area and gave him an envelope containing $3,000 in bills.[8] The next morning (January 7) Harris and Chandler were observed driving up to the Internal Revenue building in Harris' car and talking together as they entered the building. Later that day Chandler purchased some clothing with one of the marked bills and when arrested that same afternoon $1,400 of the marked money was found in his wallet. Harris was arrested that evening but none of the marked money was found in his possession.

One of the many contentions raised by the defendant on appeal is that the trial court erred in not excluding the tape recordings and all other evidence obtained from eavesdropping. The tapes objected to were recordings (1) of personal conversations between Harris and Dwork in the latter's office and in his automobile, and (2) of recordings of telephone conversations between them. Defendant's chief objection to the admission of these tapes[9] is that this evidence violates his Fourth Amendment right of privacy.

This is not a case in which the listening and recording devices were planted secretly in defendant's home by some

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[7] At this meeting Harris read his "write-off" report to Dwork and returned the $4,000 check. Dwork then agreed to give him $3,000 which Harris insisted be in cash.

[8] The money was passed to Harris on the evening of January 6 in Dwork's car in the parking lot. Harris cautioned him to keep quiet about the deal and made other incriminating remarks. The $3,000 in bills had been marked and the serial numbers recorded by an Internal Revenue Inspector prior to delivery of these bills to Dwork.

[9] In our opinion the other objections raised to the admission of the tapes do not warrant discussion.

unlawful physical invasion. *Silverman* v. *United States,* 365 U.S. 505 (1961). Here, all the recorded personal conversations took place in Dwork's office or in his automobile. The recording devices were installed and the recordings made with Dwork's express consent. Also, the admission in evidence of recordings of the various telephone conversations between Harris and Dwork which were made in the latter's office was entirely proper. Dwork, who was a party to them, certainly was entitled to disclose the contents of these conversations. The fact that the disclosures were made through the medium of an electronic recording device does not render them inadmissible. *Glacy* v. *United States,* 361 F. 2d 31, 35 (1st Cir. 1966), *cert. denied,* Oct. 10, 1966. Therefore, the admission of all the recordings complained of by defendant was proper.[10]

Defendant's principal contention on appeal is that he was denied a fair trial because of the partisan manner in which the trial was conducted. In support of this contention he endeavors to persuade us that the trial court (1) refused to give defendant's counsel a full opportunity to cross examine government's witnesses; (2) addressed disparaging remarks to defendant's counsel in the presence of the jury and (3) made partisan comments in the course of its charge to the jury.

From our examination of the voluminous record in this case we are satisfied that this contention is without merit. The extent to which cross examination shall be allowed rests within the sound discretion of the trial court. In order to establish an abuse of discretion in this case, the defendant must show that the restrictions imposed upon his cross examination were clearly prejudicial. *McManaman*

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[10] It should be noted that a proper foundation for the admission of these recordings was laid through the testimony of one of the Internal Revenue inspectors who helped to make them.

v. *United States*, 327 F.2d 21, 24 (10th Cir.), *cert. denied*, 377 U.S. 945 (1964). There is no such showing here.[11]

The record indicates that the alleged disparaging remarks complained of were made during bench conferences with counsel and there is no showing that they were heard by the jury.[12] Consequently, we cannot say that these remarks prejudiced the defendant's case or amounted to a denial of a fair trial as he claims.

Defendant quotes two unconnected portions of the court's charge,[13] taken out of context, in an attempt to show that the court's comments during the charge were of a partisan character, and denied defendant a fair trial.[14] As we said in *Charles A. Wright, Inc.* v. *F. D. Rich Co., Inc.*, 354 F.2d 710, 713-714 (1st Cir.), *cert. denied* 384 U.S. 960 (1966), "The fairness of a charge cannot be determined by considering only a portion of it out of context. On appeal, the charge must be examined as a whole and portions of it will not be scrutinized apart from their content as isolated verbal phenomena." Also, it should be noted here that in giving his charge, a trial judge is necessarily vested with wide discretion. *Dranow* v. *United States*, 307 F.2d 545 (8th Cir. 1962).

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[11] In fact, it appears that the trial court allowed defendant's counsel considerable latitude in his cross examination of government witnesses.

[12] Only two bench conferences are involved and one of them took place after 4 p.m. presumably after the jury had left the courtroom for the day.

[13] (1) The court admonished the jury to keep in mind that it was Harris, not the Internal Revenue Service or the delinquent taxpayer or its attorney, who was on trial and then stated briefly the offenses set forth in the indictment. (2) The court stated Count 3 in its own language and explained that this is a substantive charge as distinguished from the conspiracy counts.

[14] Defendant did not object to either of these portions of the charge.

We have examined the charge as a whole and in our opinion the trial court was well within the limits of this discretion in making the remarks complained of. Taken in context these remarks [15] do not constitute prejudicial error or deprive defendant of a fair trial.

All other points raised have been considered and have been found to be without merit.

Affirmed.

[15] Certainly the court had the right to tell the jurors who was and who was not on trial before them and also the nature of the charges. The record does not indicate that this was done in an unfair manner. Obviously the other portion of the charge which related to Count 3 of the indictment did not result in any prejudice. The jury found Harris not guilty of the crime charged in this count.

Appendix B.

JUDGMENT

October 28, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD

Clerk.

Enter:

/s/ ALDRICH, Ch.J.